STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 267896 Oakland Circuit Court
TITUS CURTIS WILLIS, Defendant-Appellant.	LC No. 2005-204380-FC

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529. He was sentenced as a habitual offender, fourth offense, MCL 760.12, to 37 ½ to 60 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first claims on appeal that the trial court erred in denying his motion to dismiss based on a violation of the 180-day rule. We review a trial court's decision on a motion to dismiss for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). An abuse of discretion occurs when the trial court selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The 180-day rule "expressly provides that the Department of Corrections must deliver a written notice of incarceration and request for disposition 'to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending . . . .'" *People v Williams*, 475 Mich 245, 256; 716 NW2d 208 (2006), quoting MCL 780.131. To trigger the 180-day rule, the prosecuting attorney must receive notice from the Department of Corrections of the defendant's incarceration and a request for final disposition of the pending charges. *Id.* at 259. In the present case, the Department of Corrections never delivered written notice of defendant's incarceration and a request for final disposition of the pending charges to the prosecuting attorney. Rather, the prosecuting attorney asserted that a LEIN entry at the local district court where the crimes occurred provided notice of defendant's incarceration, and the DOC did not provide notice in accordance with MCL 780.131 to commence the 180-day period. Defendant's reliance on constructive notice from the DOC to the local district court does not satisfy the statute. *Williams, supra* at 256, 259. Accordingly, the 180-day rule was not triggered in the present case. We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion to dismiss based on the 180-day rule. *Adams, supra*.

Defendant also claims that he was denied his right to a speedy trial. When moving for dismissal, defendant stated that his motion to dismiss was based on MCL 780.131 and the Sixth Amendment. However, defendant never argued that his right to a speedy trial was violated, and the trial court did not decide whether defendant was denied a speedy trial. Accordingly, the issue whether defendant was denied his right to a speedy trial is unpreserved. See *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004) (explaining that an issue is not properly preserved for appellate review if it was not raised before and decided by the trial court). We review an unpreserved claim of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The federal and state constitutions guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; *Williams, supra* at 261. In determining whether a defendant was denied his right to a speedy trial, a court must balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). The fourth element is critical to the analysis. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). If the delay is 18 months or more, prejudice is presumed. *Id.* A "presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *People v Wickham*, 200 Mich App 106, 109-110; 503 NW2d 701 (1993).

The time for judging whether a defendant has been denied his right to a speedy trial runs from the date of his arrest. *Williams, supra* at 261. While the record establishes that a warrant was issued in Oakland County for defendant's arrest on June 12, 2001, the record does not indicate when defendant was formally arrested on this warrant. Nevertheless, it is undisputed that defendant was arraigned on August 25, 2005. MCR 6.104(A) requires the arraignment of an arrested person to take place without unnecessary delay. Any delay over 48 hours is presumed to be unreasonable. *People v Manning*, 243 Mich App 615, 628; 624 NW2d 746 (2000). In this case, there is no allegation by defendant that his arraignment did not take place as required following his arrest on the charges at issue. As such, we presume his arrest on the charges occurred approximately three months before trial. We conclude that the approximate three-month time period between arrest and trial does not violate the right to a speedy trial.

Defendant next sets forth on appeal several claims of ineffective assistance of counsel. To preserve a claim of ineffective assistance of counsel for appellate review, a defendant must move for a new trial or for a *Ginther*[1] hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Because defendant did not move for a new trial or *Ginther* hearing, our review of defendant's claims is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In reviewing the record, we note that defendant's affidavit, the affidavits of his aunt and cousin, obituaries of alleged alibi witnesses, and the narrative police report, which are attached to his supplemental brief on appeal, were

[1] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

never made a part of the lower court record. As such, we are precluded from reviewing them in analyzing defendant's claims of ineffective assistance of counsel. *Id.*

To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Counsel is presumed to have provided effective assistance, and the defendant bears a heavy burden to prove otherwise. *Id.* A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001),

Defendant first asserts that he was denied the effective assistance of counsel because counsel failed to properly present defendant's claim that he was denied his right to a speedy trial. Counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). As previously discussed, defendant's speedy trial issue is without merit. Accordingly, defendant has failed to establish that counsel's failure to properly present a motion to dismiss based on a violation of defendant's right to a speedy trial fell below an objective standard of reasonableness. *Mack, supra* at 129.

Defendant next asserts that counsel was ineffective when he failed to investigate witnesses and evidence that would have allowed defendant to assert a misidentification defense. However, the record does not contain evidence that counsel failed to investigate certain witnesses or evidence. Because defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), this issue does not have merit.

Similarly, defendant asserts that counsel was ineffective for failing to call his aunt and cousin as witnesses at trial. He claims that both of them could have testified that the man seen entering and leaving the CVS/pharmacy on the surveillance video was not defendant. Decisions regarding whether to call witnesses are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The failure to call a witness at trial can only constitute ineffective assistance of counsel when the failure deprived the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The lower court record contains no summary as to the proposed testimony of defendant's aunt and cousin. Thus, it is not apparent from the record that counsel's decision not to call them as witnesses deprived defendant of a substantial defense. *Hoyt, supra* at 537-538. Defendant has failed to establish his claim that counsel was ineffective for failing to call certain witnesses at trial.[2]

[2] The videotape was not submitted with the lower court record for appellate review. However, the prosecuting attorney stated in closing argument: "That video I don't think is particularly helpful. You can't see much in that video." Consequently, in closing argument, the prosecutor argued that the credibility of the identification testimony of the victims of the crimes provided
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Defendant finally asserts that, pursuant to *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), he is entitled to a presumption of prejudice because counsel failed to subject the prosecution's case to meaningful adversarial testing. In *Cronic, supra*, the Supreme Court stated that it is unnecessary for a defendant to show that he was prejudiced by counsel's deficient performance if "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. However, for prejudice to presumed, counsel's failure to subject the prosecution's case to meaningful adversarial testing "must be complete." *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). In the present case, the record is devoid of any indication that counsel failed to investigate witnesses and evidence or that defendant failed to call trial witnesses whose testimony would have been favorable to defendant. Accordingly, defendant has failed to establish the factual predicate of his claim that counsel completely failed to subject the prosecution's case to meaningful adversarial testing. *Hoag, supra* at 6. Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

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the evidentiary support for the convictions.